No. 18-2705

In the United States Court of Appeals for the Eighth Circuit

CASEY VOIGT; JULIE VOIGT,

Plaintiffs-Appellants,

v.

COYOTE CREEK MINING COMPANY, LLC, a North Dakota Corporation,

Defendant-Appellee.

Appeal from the United States District Court
for the District of North Dakota – Bismarck, No. 1:15-cv-00109-CSM.
The Honorable **Charles S. Miller**, Judge Presiding.

BRIEF OF PLAINTIFFS-APPELLANTS CASEY VOIGT AND JULIE VOIGT

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SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

Plaintiffs/Appellants Casey and Julie Voigt are ranchers. Their ranch is upon and adjacent to Defendant/Appellee Coyote Creek Mining Company's newly constructed coal mine. The Mine includes a mine face and a coal processing facility, both of which are physically separated by three to four miles and are connected via a haul road. The North Dakota Department of Health issued the Mine a minor source permit to construct these facilities pursuant to the Clean Air Act in 2015. The Department issued this permit with no public notice or opportunity for comment.

The Environmental Protection Agency has promulgated New Source Performance Standards that apply to coal processing facilities. The Voigts allege that the Mine is operating an eight acre, up to 180,000 ton coal pile co-located at its Coal Processing Plant without the dust control plan required by 40 C.F.R. § 60.254(c). The Voigts also allege that the Mine was unlawfully constructed without a major source Clean Air Act permit. The Mine disagrees. Both claims require determination of whether Defendant's facilities that are co-located at its coal processing plant are "in" or part of the coal processing plant.

No court (other than the district court) has had the opportunity to review the specific regulations at issue in this case, and therefore the Voigts request 30 minutes for oral argument.

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JURISDICTIONAL STATEMENT

This is an appeal from a final order that disposed of all the Plaintiffs'/Appellants' claims against Defendant/Appellee. This Court has jurisdiction under 28 U.S.C. § 1291. Appellants appeal from the District of North Dakota's July 10, 2018 final judgment.

The United States District Court for the District of North Dakota had jurisdiction pursuant to 28 U.S.C. § 1331 (federal question) and 42 U.S.C. § 7604(a)(1) and (a)(3) (Clean Air Act jurisdiction).

On July 31, 2018, Appellants timely filed a Notice of Appeal within thirty days of the final judgment and order disposing of all relevant issues in this case.

STATEMENT OF ISSUES

1. Whether the district court erred by concluding that the applicability of 40 C.F.R. § 60.250 *et seq.* to defendant's open coal storage pile and activities upon the coal pile is ambiguous.

- *Christensen v. Harris Cty.*, 529 U.S. 576 (2000)
- *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 557 U.S. 261 (2009)
- *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)
- *Fast v. Applebee's Int'l, Inc.*, 638 F.3d 872 (8th Cir. 2011)

2. Whether the district court erred by concluding through summary judgment that defendant's open coal storage pile and activities upon the pile are not part of a coal preparation and processing plant and thus not subject to the provisions of 40 C.F.R. § 60.250 *et seq.*

- *Star Enter. v. U.S. E.P.A.*, 235 F.3d 139 (3d Cir. 2000), *as amended* (Feb. 20, 2001)
- *Wisconsin Elec. Power Co. v. Reilly*, 893 F.2d 901 (7th Cir. 1990)
- *Potomac Elec. Power Co. v. E.P.A.*, 650 F.2d 509 (4th Cir. 1981)
- *National-Southwire Aluminum Co. v. U.S. E.P.A.*, 838 F.2d 835 (6th Cir. 1988)

STATEMENT OF THE CASE

This case arises from the District of North Dakota's order granting summary judgment in favor of Defendant/Appellee Coyote Creek Mining Company ("CCMC") and the final judgment following from that order. ADD-1 (Order Granting Summary Judgment of Dismissal); ADD-97 (Judgment in a Civil Case). In that order, the District Court held that the applicability of 40 C.F.R. § 60.250 *et seq.* to CCMC's open storage pile and activities upon this storage pile is ambiguous. The District Court then deferred to the State of North Dakota's interpretation of this law to conclude that 40 C.F.R. § 60.250 *et seq.* does not apply to CCMC's open coal pile and activities upon that pile.

The Plaintiffs/Appellants in this case, Casey and Julie Voigt ("Voigts"), are ranchers in Mercer County, North Dakota. JA-861 (Julie Voigt Dep. 10:6-20). Part of their ranch is mined by CCMC. JA-863; JA-864 (Julie Voigt Dep. 19:24-21:1). This mine is called the Coyote Creek Mine. The Voigts are concerned about significant air quality emissions from the mine that affect their ranch and their livelihood. *Id.* (Julie Voigt Dep. 21:11-22:8).

This Statement of the Case first describes Coyote Creek Mine's Facilities. It then describes North Dakota's permitting of the Mine. Finally, it details the procedural history of this case before the district court.

I. Coyote Creek Mine's facilities

In March of 2015, CCMC began construction of its Coyote Creek Mine. JA-368 (Def.'s Answer ¶ 62). Operations began May of 2016. *Id.* (Def.'s Answer ¶ 63). The mine generally consists of two main parts: (1) the mine face (where active mining operations occur) and (2) a coal preparation and processing plant ("CPPP"). JA-612 (Permit Application Project Diagram); ADD-98 (Color Mine Plan); ADD-99 (Grayscale Mine Plan) (hereinafter, "Mine Plans"). These two parts of the mine are connected by a three-to-four mile private coal haul road. ADD-98-99 (Mine Plans); JA-590; JA-591 (Permit Application Sections 1.0 and 1.1). The mine face, CPPP, and haul road collectively encompass the entirety of the Coyote Creek Mine. ADD-98-99 (Mine Plans). The mine face, CPPP, and haul road are included within both the mine's surface mine permit boundaries and are also described in the mine's air permit to construct issued by the North Dakota Department of Health ("NDDH"). *Id.* CCMC constructed its mine between 2015 and 2016. JA-368 (Def.'s Answer ¶ 62).

The CPPP is located at the end of the haul road immediately adjacent to Coyote Station. ADD-98-99 (Mine Plans). Coyote Station is a coal power plant that uses coal from CCMC. JA-591 (Permit Application Section 1.1). The flow of coal from the mine face to Coyote Station is important in this case and occurs as follows: the flow of coal begins with mining operations in the pit of Coyote Creek Mine. *Id.*;

JA-1860 (Brenden Brinkman Dep. 24:13-26:9). From there, CCMC loads raw coal into 240-ton haul trucks. JA-1862; JA-1872 (Brenden Brinkman Dep. 32:23-33:3; 74:4-7). These 240-ton haul trucks then haul the raw coal down the three-to-four mile haul road. At the end of the haul road, there is an eight-acre open coal storage pile. JA-591 (Permit Application Section 1.2). As explained in more detail *infra*, the pile rests directly against a large concrete retaining wall constructed by CCMC, and near the top of this retaining wall is an opening for coal to be fed into crushing equipment through a feeder. *See infra*, p. 11 (*citing* JA-1607; JA-1608 (Dewayne Lounsbury Dep. 15:16-16:13); ADD-103 (Aerial Photograph of CPPP).

At the end of the haul road, the road diverges as it enters the CPPP and changes to a one-way "coal haulage pattern." ADD-100 (Permit Application Processing Area Map). This coal haulage pattern is identified on the diagram included with CCMC's application for its permit to construct. *Id.* CCMC identified the location at which the road diverges as Station 207+38. JA-795 (Excerpt from Section 3.2.8 of Permit Application Revision); JA-1750 (CCMC Rule 30(b)(6) Dep. 44:10-14); JA-807 (Haul Road Diagram from Permit Application Section 3.2.8); ADD-104 (same). At this location, the diagram included with CCMC's application for its permit to construct indicates that the haul trucks make a slight turn and drive up the pile. ADD-100 (Permit Application Coal Processing Area Map). Once atop the pile, the haul trucks unload their coal (by dropping it out of the bottom of the truck) directly onto

the open storage coal pile. JA-591 (Permit Application Section 1.2). The trucks then continue forward, drive down the pile, and then around the bottom of the pile to rejoin the main haul road again at Station 207+38. *Id.*; ADD-104 (Haul Road Diagram from Permit Application Section 3.2.8). This process continues at a rate of approximately three trucks per hour. The storage pile is uncovered, approximately eight acres in size, and can hold up to 180,000 tons, but typically holds about 140,000 tons of coal. JA-591 (Permit Application Section 1.2); JA-1608 (Dewayne Lounsbury Dep. 16:3-10).

After the coal is dropped on the pile, bulldozers shape the coal pile, maintain the coal pile, and blend coal on the pile (for purposes of coal quality). JA-1608 (Dewayne Lounsbury Dep. 16:3-10).; JA-1858 (Brenden Brinkman Dep. 17:10-17). When Coyote Station needs more coal delivered, the bulldozer conveys coal (by pushing it) directly from the top of the coal pile into the feeder-breaker. JA-1615; JA-1616 (Dewayne Lounsbury Dep. 45:14-49:8). The feeder-breaker is situated near the top of the retaining wall well off the ground. JA-1608 (Dewayne Lounsbury Dep. 16:3-13).; ADD-103 (Aerial Photograph of CPPP). Because the feeder-breaker is located high above the ground, without the coal pile, it would not be possible to load coal into the feeder-breaker without re-designing and re-constructing the facility. ADD-26 (Order Granting Summary Judgment of Dismissal, p. 26); JA-1615; JA-1616 (Dewayne Lounsbury Dep. 47:4-48:13). For example, CCMC's CPPP operator

explained that if the coal pile did not exist, the mine would likely need to build a "big ramp" to convey coal from the haul road into the feeder. JA-1615 (Dewayne Lounsbury Dep. 47:13).

After the bulldozers convey coal by pushing it from the pile and into the feeder, the feeder then feeds coal to the breaker, which is located immediately on the opposite side of the concrete retaining wall. ADD-102 (Aerial Photograph of Haul Road and CPPP); JA-591 (Permit Application Section 1.2). The breaker reduces the size of the coal to approximately eight inches in width (the breaker is also called the primary crusher). JA-1774 (CCMC Coal Processing Facility Preliminary Feasibility Evaluation). Then, the coal drops into a secondary crusher, which crushes the coal to an approximately three-inch diameter. *Id.* After passing through the secondary crusher, the coal drops onto a conveyor belt, which transports the coal directly Coyote Station, which is on the other side of a fence that separates the CPPP and Coyote Station. *Id.*; JA-591 (Permit Application Section 1.2). A diagram of the crushing equipment is available at JA-614 (Coal Processing Details).

The crushing equipment and conveyor belt has a rated capacity of up to 2,000 tons of coal per hour. JA-618 (Permit to Construct Section 1). The CPPP typically has just one operator. JA-1606 (Dewayne Lounsbury Dep. 10:20-11:8). The operator typically sits directly in the primary bulldozer (a model 844 bulldozer) atop the coal pile. JA-1616; JA-1617 (Dewayne Lounsbury Dep. 48:11-55:6); JA-1631; JA-1632

(Dewayne Lounsbury Dep. 111:18-112:17). CCMC's CPPP operator refers to the "844 rubber tire dozer" and the "crusher facility" as one "coal plant." JA-1606 (Dewayne Lounsbury Dep. 11:1-8). The primary bulldozer has a remote-control computer that both depicts and controls equipment at the CPPP. JA-1616 through JA-1623 (Dewayne Lounsbury Dep. 49:18-79:25); JA-1887 through JA-1889 (Photographs of Remote-Control Computer). The computer also depicts the pile itself. JA-1887 through JA-1889. By using the computerized remote-control in the bulldozer, the CPPP operator increases and decreases the speed of the crushing equipment to match the rate at which the bulldozer is conveying coal from the pile to the feeder-breaker. JA-1618 (Dewayne Lounsbury Dep. 56:19-57:6).

A portion of Coyote Creek Mine's application for its surface mining permit is also relevant to this case. Section 3.2.8 of that permit application, which discusses CCMC's haul road, states that "[t]he haulroad design will end at Station 207+38 where the haulroad ties into the coal processing pad." JA-795 (Excerpt from Section 3.2.8 of Permit Application Revision). CCMC identified this "coal processing pad" as an area that was specifically graded during construction to plus or minus 0.3 feet. *Id.*; JA-1750 (CCMC Rule 30(b)(6) Dep. 41:17-43:13); JA-1884. In a 30(b)(6) deposition, CCMC circled this graded area on an aerial photograph. ADD-101. The circled area indicates that the coal processing pad contains the open storage pile, the crushing equipment, the control room, and the coal haulage pattern around the pile

beginning at approximately Station 207+38. *Id.*; ADD-104 (Haul Road Diagram from Permit Application Section 3.2.8). Additionally, CCMC confirmed that the area circled on the aerial photograph matches a similar demarcation line present in Section 3.2.8 of CCMC's application for its surface mining permit, and that the area circled on the photograph also closely matches up with a similar line contained in a diagram that CCMC attached to its application for its air permit to construct. ADD-104 (diagram of CPPP area with Station 207+38 circled); JA-840 (Coal Processing Area Map from application for permit to construct); JA-1751 (CCMC Rule 30(b)(6) Dep. 46:8-47:8). In short, all depictions of the CPPP include the coal pile as part of the CPPP pad.

II. North Dakota's permitting of the Mine as a "minor source" without public comment.

On September 9, 2014, CCMC submitted an application to the North Dakota Department of Health for a minor source air quality Permit to Construct its coal mine, including the coal processing facility. JA-587 (Permit to Construct Application). The application argued that "[u]nloading the raw lignite coal to the open storage pile is not regulated by [NSPS] Subpart Y. Therefore, the only emission unit at CCMC subject to NSPS Subpart Y is the coal processing equipment (FUG-1)." JA-599.

On January 7, 2015, the North Dakota Department of Health ("NDDH") granted CCMC's application for its minor source air quality permit to construct in

full, resulting in the issuance of NDDH permit PTC15001. JA-618 through JA-622 (Air Pollution Control Permit to Construct). NDDH issued this permit without giving any opportunity to the public for public comment, and without giving the public any notice that it was considering or had issued this permit. JA-66 (Email from Craig Thorstenson to Becky Osborn dated July 20, 2015). The Voigts had no knowledge of this permitting process prior to approval of the permit. JA-69-70 (Affidavit of Casey Voigt ¶¶ 2, 4).

The permit lists two emission units. FUG-1 is described as "Coal processing equipment consisting of primary and secondary crushing and conveying with a rated capacity of 2,000 tons/hour." FUG-2 is described as "[f]acility-wide emissions" and includes the "[o]pen coal storage pile." JA-618 (Permit to Construct).

Other than the application and the permit, discovery that took place before the district court revealed only two additional documents that form NDDH's written record regarding its issuance of PTC1501. Those two documents are an Air Quality Effects Analysis ("AQEA") and an email exchange between NDDH and CCMC. JA-623 through JA-627 (AQEA); JA-631 (Craig Thorstenson and Donn Steffen Emails dated Dec. 12, 2014). The AQEA is essentially a working document from NDDH. This document contains no discussion or analysis relevant to the question of which facilities should properly be included in CCMC's coal preparation and processing plant for purposes of EPA's New Source Performance Standards. It

simply states in conclusory fashion that "[t]he coal processing equipment [FUG-1] is subject to Subpart Y." JA-624 (AQEA Potentially Applicable Rules). The email exchange is relevant to this case, but it does not contain any analysis from NDDH either. In the email exchange, NDDH stated that "[a] fugitive coal dust emissions control plan must be submitted. The plan must meet the requirements outlined in 40 CFR 60.254(c)" (i.e., NSPS Subpart Y), CCMC responded:

> As described in Section 2.1.1 [of CCMC's application for its permit to construct], the coal storage pile is not subject to NSPS Subpart Y and thus a fugitive dust control plan as described in 40 CFR 60.254(c) is not required for this facility.

JA-632 (Email from Donn Steffen to Craig Thorstenson dated Dec. 12, 2014). Additionally, in response to an earlier question in that same email exchange, CCMC stated:

> [a]s described in Section 2.1.1 of the application, the coal pile itself and the associated apron feeder are not subject to NSPS Subpart Y, rather NSPS Subpart Y applicability begins once coal enters the coal preparation plant, thus emission controls are not required for the storage pile nor the apron feeder that draws the coal into the preparation plant.

JA-631. NDDH responded by saying "[t]hanks for the clarification. I will have a draft permit to you soon." *Id.* (Email from Craig Thorstenson to Donn Steffen dated Dec. 12, 2014). Thus, the only analysis of Subpart Y applicability to the coal pile was conducted by CCMC itself.

III. Proceedings before the district court

On August 12, 2015, the Voigts filed suit with the district court against CCMC pursuant to the Clean Air Act's citizen suit provisions. JA-15 (Compl. and Jury Demand). The allegations in the initial complaint alleged that fugitive emissions of particulate matter ("PM") from CCMC's coal preparation and processing plant exceed 250 tons per year, and therefore CCMC had constructed its mine as a major source of air pollution without obtaining a mandatory major source permit to construct pursuant to the Clean Air Act's Prevention of Significant Deterioration ("PSD") permitting requirements. 42 U.S.C. § 7475(a). JA-29; JA-30 (Compl. ¶¶65-70). The complaint specifically alleged that CCMC's open storage coal pile and associated activities upon the pile, such as bulldozing and truck unloading operations, are part of CCMC's CPPP subject to the provisions of NSPS Subpart Y, and therefore these facilities' and activities' potential to emit must be counted for purposes of PSD permitting. The Voigts asserted this claim as their sole claim in their initial complaint.

CCMC moved to dismiss this claim, relying primarily on the argument that the district court should abstain from considering the case because it would infringe upon North Dakota's air pollution program. ECF 7 (Mot. to Dismiss by CCMC). The district court denied CCMC's motion to dismiss, noting that that the law at issue in this case is principally federal law, that the federal interests in that law are

significant, and that the Voigts further had no reasonable opportunity to participate in the state's permitting process. JA-257 (Order Granting Mot. to Am. Compl. and Den. Mot.to Dismiss).

Once CCMC began operations at the mine, and following the district court's denial of CCMC's motion to dismiss, the parties stipulated to allow the Voigts to add a second claim to the case. That claim asserted that CCMC was also operating its open storage coal pile in violation of New Source Performance Standards because CCMC was operating its pile without the dust control plan required by 40 C.F.R. § 60.254(c). JA-330 (First Am. Compl. and Jury Demand).

On August 15, 2017, shortly prior to the deadline to file dispositive motions, the Voigts and CCMC stipulated that issues of liability in this case would be tried to a jury, and issues of civil penalties under the Clean Air Act would be determined by the district court in bifurcated proceedings. JA-409 (Stipulation for Bifurcation). The district did not make a decision regarding whether to adopt this stipulation as a formal order.

On August 23, 2017, both parties moved the district court through summary judgment for a determination as to whether the coal pile and activities upon the pile must be included as part of the coal preparation and processing plant for purposes of NSPS Subpart Y. The Voigts specifically moved:

> [F]or partial summary judgment that CCMC's haul road[1] after Station 207+38 is part of its CPPP, that its coal pile is part of its CPPP, that activities upon the pile are part of the CPPP, that the apron feeder is part of the CPPP, that the primary and secondary crushers are part of the CPPP, that transfer from the secondary crusher to the conveyor belt is part of the CPPP, and that the conveyor belt that conveys coal from the secondary crusher to Coyote Station's coal barn is part of CCMC's CPPP because, as a matter of law, those facilities and activities are part of its coal preparation and processing plant. Fed.R.Civ.P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). The Voigts also move for summary judgment because a reasonable jury would be unable return a verdict for CCMC finding that these facilities and activities are not part of its CPPP.

JA-505 (Pl.'s Mot. for Partial Summ. J.). Coyote Creek Mine filed a separate cross-motion for summary judgment requesting that the district court "dismiss[] Plaintiffs' claims against CCMC in their entirety." JA-411 (Def.'s Mot. for Summ. J.). The North Dakota Department of Health filed an *amicus curiae* brief in favor of CCMC with the district court, as did the Lignite Energy Council, which is an industry trade group. ECF 92 (Br. of *Amicus Curiae* by State of N.D.); ECF 103 (Br. of *Amicus Curiae* by Lignite Energy Council). Additionally, CCMC moved the district court to strike the testimony of the Voigts' rebuttal expert. ECF 69 (Mot. to Strike Expert Test. By CCMC).

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[1] To clarify, the "haul road" referenced in this excerpt refers to the portion of the "haulage pattern" that occurs on the graded pad, within the confines of the demarcated area indicated in JA544; JA559; JA563; and JA592. The Voigts do not argue that the three-to-four mile haul road, which connects the mine face to the CPPP beginning at Station 207+38, is part of the CPPP. The portion of the haul road that the Voigts assert is part of the CPPP is referred to herein as the "haulage pattern" or "coal haulage."

On July 3, 2018, the district court denied CCMC's motion to exclude the Voigts' rebuttal expert (ECF 126) and granted summary judgment in favor of CCMC and against the Voigts. ADD-1 (Order Granting Summ. J. of Dismissal). In its Order granting CCMC summary judgment, the district court specifically found that "[t]he governing regulations do not provide a clear answer," as applied to the circumstances of this case. ADD-33. The district court specifically indicated that the Voigts' interpretation of NSPS Subpart Y is "plausible," but that CCMC's interpretation that the CPPP does not begin until coal is loaded into the feeder-breaker is also "plausible." To resolve this perceived ambiguity, the court deferred to the state of North Dakota's interpretation of purely federal law. Specifically, the district court stated:

> But to be clear, the court's decision that the coal pile is not subject to Subpart Y should not be viewed as anything more than the court having given deference to the NDDOH's determination as the tie-breaker based on the record before the court that potentially could be incomplete with respect to EPA's views on the matter. Further, to put a finer point on it, the court's decision is not required by the language of Subpart Y. Thus, it may be possible for EPA to avoid a similar result in the future for similarly situated coal piles by providing clarifying guidance.

ADD-77. The district court also explained that "the conclusion upon appeal might very well be that the only one who has failed in properly interpreting and applying Subpart Y and EPA's guidance is the undersigned." ADD-70, FN 16.

Judgment was entered by the clerk of court on July 10, 2018. ADD-97. This appeal followed.

SUMMARY OF THE ARGUMENT

The district court erred for two primary reasons. First, 40 C.F.R. Part 60, Subpart Y ("NSPS Subpart Y") is clear and unambiguous. This NSPS defines "open storage pile" as "any facility … that is not enclosed that is used to store or process coal." 40 C.F.R. § 60.251(m) (emphasis added). Further, the NSPS also clearly states what is not part of the coal processing facility: "[e]quipment located at the mine face." 40 C.F.R. § 60.251(f).

When these definitions are applied to the facts of this case, it is clear and unequivocal that Coyote Creek Mine's coal pile, coal haulage area immediately surrounding this pile, and loading, unloading, and conveying activities that take place upon this pile are all in and part of Coyote Creek Mine's coal processing plant. First, these facilities are all co-located together far from the mine face. ADD-98 (Mine Plan). The feeder-breaker is built into a wall that protrudes out directly into the pile. JA-1850 (Photograph of Feeder-Breaker); JA-1895 (Photograph of Feeder-Breaker). The crushing equipment is operated via remote control from a bulldozer that operates on top of the pile. JA-1616 through JA-1623 (Dewayne Lounsbury Dep. 49:18-79:25); JA-1887 through JA-1889 (Photographs of Remote-Control Computer). The coal processing facility operator recognizes that the bulldozer that

operates atop the pile and the crushing equipment are part of the same facility. JA-1606 (Dewayne Lounsbury Dep. 11:1-8). The mine's documents also show that the haul road ties into a coal processing facility pad, which is an area that was specifically graded for purposes of the coal pile, coal haulage immediately around the pile, and the crushing equipment. JA-795 (Excerpt from Section 3.2.8 of Permit Application Revision)); JA-1750 (CCMC Rule 30(b)(6) Dep. 41:17-43:13); JA-1785 (Plan and Profile of Conveyer and Pad); ADD-101 (Aerial Photograph of CPPP); ADD-104 (Haul Road Diagram from Permit Application Section 3.2.8). Under these circumstances, NSPS Subpart Y clearly and unambiguously applies to these facilities and activities, and the district court erred by holding otherwise.

Additionally, even assuming *arguendo* that NSPS Subpart Y is ambiguous as applied to the circumstances of this case, the district court resolved this ambiguity improperly as a matter of law by deferring to North Dakota's purported interpretation of NSPS Subpart Y, which is federal law of national applicability. EPA has specifically created a process by which any owner or operator of a facility can request a determination from EPA as to whether or not an NSPS applies. 40 C.F.R. § 60.5. EPA has therefore expressly reserved to itself the authority to determine NSPS applicability. Further, EPA's does not and cannot delegate authority to the states to make determinations that affect national consistency of these laws (e.g., by interpreting ambiguous laws). *See infra* pp. 35-39. This reflects

Congress's intention that New Source Performance Standards be laws of nationwide applicability. Further, the district court also erred by deferring to the State of North Dakota's interpretation because the State failed to create a meaningful record of its decision. The State intentionally did not put use public notice and comment procedures for this permit. Instead, the State simply approved a minor source permit for the mine based upon the CCMC's representations alone. Under basic principles of federal administrative law, this is sufficient to reverse an agency's determination. Deference under these circumstances was improper.

STANDARD OF REVIEW

This appeal arises out of the district court's order granting CCMC summary judgment. The standard of review for a summary judgment determination is as follows:

> We review a grant of summary judgment de novo. *Gentry v. Georgia–Pac. Co.*, 250 F.3d 646, 649 (8th Cir.2001). Summary judgment is appropriate if viewing the record in the light most favorable to the nonmoving party, there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. See Fed.R.Civ.P. 56(c); *Smith v. Ashland, Inc.*, 250 F.3d 1167, 1171 (8th Cir.2001). An issue of fact is genuine when "a reasonable jury could return a verdict for the nonmoving party" on the question. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). We may affirm the district court's grant of summary judgment on any ground supported by the record. *Gamradt v. Federal Laboratories, Inc.*, 380 F.3d 416, 419 (8th Cir.2004).

Woods v. DaimlerChrysler Corp., 409 F.3d 984, 990 (8th Cir. 2005).

ARGUMENT

The district court's determination that CCMC's open storage coal pile and activities upon that pile (including coal haulage after Station 207+38, coal unloading, bulldozing, coal blending, and pile maintenance) are not part of CCMC's coal preparation and processing plant is in error for two primary reasons. First, the regulations at issue—40 C.F.R. § 60.250 *et seq.*—clearly and unambiguously apply to these facilities and activities. The district court's determination that these regulations are unclear as applied to the circumstances of this case is in error. Second, the district court's decision to defer to the state of North Dakota to resolve this perceived ambiguity is also in error because EPA has expressly reserved to itself the authority to interpret its regulations and has not delegated this authority to the states. Further, the district court's deferential review of the state's determination is in error because the state did not engage in a meaningful review or make a meaningful record upon which to base deference.

I. Clean Air Act background

Before turning to the merits of this case, some discussion of the Clean Air Act is necessary. CAA § 111, 42 U.S.C. § 7411, establishes the Clean Air Act's New Source Performance Standards. Under this statute, EPA's Administrator is first required to "publish … a list of categories of stationary sources. He shall include a category of sources in such list if in his judgment it causes, or contributes

significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7411(A). Then, "[w]ithin one year after the inclusion of a category of stationary sources in a list under subparagraph (A), the Administrator shall publish proposed regulations, establishing Federal standards of performance for new sources within such category." 42 U.S.C. § 7411(B).

In promulgating Subpart Y's original performance standards in 1974, EPA explained that "[c]oal preparation plants are major sources of particulate matter emissions which can have an adverse effect on health" and they "contribute significantly to air pollution." USEPA's Proposed Standards of Performance for New Stationary Sources (Coal Processing Plants), 39 Fed. Reg. 37922, (Oct. 24, 1974). EPA thus made an explicit determination that coal preparation and processing plants "cause[] or contribute[] significantly to, air pollution" and "may reasonably be anticipated to endanger public health or welfare" pursuant to 42 U.S.C. § 7411(A), and are therefore a delineated "category of stationary sources" to which "Federal standards of performance" shall apply. 42 U.S.C. § 7411(A).

40 CFR Part 60, Subpart Y is the regulation pertaining to the source category for coal preparation and processing plants. Specifically, this source category applies to "affected facilities in coal preparation and processing plants that process more than 181 megagrams (Mg) (200 tons) of coal per day." 40 C.F.R. § 60.250(a) (emphasis added). The parties in this case agree that NSPS Subpart Y applies to

CCMC's CPPP. The parties disagree, however, as to which facilities are "in" the CPPP.

EPA defines any "apparatus to which a [New Source Performance Standard] is applicable" as an "affected facility." 40 C.F.R. § 60.2. 40 C.F.R. § 60.250(d) lists the specific affected facilities to which standards apply for coal preparation and processing plants. That provision states that performance standards (or work practice standards) "are applicable to any of the following affected facilities that commenced construction, reconstruction or modification after May 27, 2009: Thermal dryers, pneumatic coal-cleaning equipment (air tables), coal processing and conveying equipment (including breakers and crushers), coal storage systems, transfer and loading systems, and open storage piles." (emphasis added).

40 C.F.R. § 60.254(c) sets specific performance standards (in the form of work practice standards) for open storage coal piles at a coal preparation and processing facility. That provision specifically states that "[t]he owner or operator of an open storage pile, which includes the equipment used in the loading, unloading, and conveying operations of the affected facility, constructed, reconstructed, or modified after May 27, 2009, must prepare and operate in accordance with a submitted fugitive coal dust emissions control plan that is appropriate for the site conditions as specified in paragraphs (c)(1) through (6) of this section." 40 C.F.R. § 60.254(c). Paragraph (c)(2) requires that:

> For open coal storage piles, the fugitive coal dust emissions control plan must require that one or more of the following control measures be used to minimize to the greatest extent practicable fugitive coal dust: Locating the source inside a partial enclosure, installing and operating a water spray or fogging system, applying appropriate chemical dust suppression agents on the source (when the provisions of paragraph (c)(6) of this section are met), use of a wind barrier, compaction, or use of a vegetative cover.

Id.

Finally, the Clean Air Act's PSD provisions provide that "[n]o major emitting facility … may be constructed … unless" a PSD permit has been issued that includes, among other things, "best available control technology." 42 U.S.C. § 7475. The Act defines "major emitting facility" for purposes of this case as "any other source with the potential to emit two hundred and fifty tons per year or more of any air pollutant." 42 U.S.C. § 7479(1). The EPA's regulations implementing the PSD program are available at 40 C.F.R. § 52.21. Of relevance to this case, those regulations state specifically that "fugitive emissions" do not count toward the PSD major source threshold, except that fugitive emissions from NSPS source categories that existed prior to August 7, 1980 *do* count toward the PSD major source threshold. 40 C.F.R. § 52.21(b)(1)(iii)(aa). All parties agree that this includes NSPS Subpart Y, which was promulgated in 1974. Because emissions from CCMC's coal pile and activities upon this pile do not "pass through a stack, chimney, vent, or other functionally equivalent opening," these emissions are "fugitive emissions. 40 C.F.R. § 52.21(b)(20). Thus, the determination of which facilities are "in" CCMC's coal

preparation and processing facility is central to both the Voigts' PSD and NSPS claims.

II. NSPS Subpart Y is clear and unambiguous—it applies to "any" storage pile in "any facility" used to process coal that is not "at the mine face."

The regulations at issue in this case that form the relevant provisions of NSPS Subpart Y are clear and unambiguous. Particularly when read together, they have "obvious meaning." *Christensen v. Harris Cty.*, 529 U.S. 576, 588 (2000). They are not open to interpretation or subject to deference. "[D]eference is warranted only when the language of the regulation is ambiguous." *Fast v. Applebee's Int'l, Inc.*, 638 F.3d 872, 878 (8th Cir. 2011) (quoting *Christensen*, at 588); *cf. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984) ("[f]irst … is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter"). Only if agencies' regulations are ambiguous does a court "turn to the agencies' subsequent interpretation of those regulations." *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 557 U.S. 261, 278 (2009). Thus, if the plain language of a regulation is clear, that is the end of the matter.

NSPS Subpart Y contains the following relevant definitions:

> Coal preparation and processing plant means any facility (excluding underground mining operations) which prepares coal by one or more of the following processes: breaking, crushing, screening, wet or dry cleaning, and thermal drying.

> ...
> Open storage pile means any facility, including storage area, that is not enclosed that is used to store coal, including the equipment used in the loading, unloading, and conveying operations of the facility.
> ...
> Coal processing and conveying equipment means any machinery used to reduce the size of coal or to separate coal from refuse, and the equipment used to convey coal to or remove coal and refuse from the machinery. This includes, but is not limited to, breakers, crushers, screens, and conveyor belts. Equipment located at the mine face is not considered to be part of the coal preparation and processing plant.

40 C.F.R. § 60.251(e),(f),(m) (emphasis added).

Here, EPA has clearly and unambiguously stated that "[o]pen storage pile means any facility including storage area, that is not enclosed that is used to store coal..." *Id.* (emphasis added). Thus, EPA has stated its clear intention that NSPS Subpart Y broadly apply to open storage piles, "including the equipment used in the loading, unloading and conveying operations" of the pile. *Id.*; *see also* 40 C.F.R. § 60.254(c) ("open storage pile, which includes the equipment used in the loading, unloading, and conveying operations"). EPA has also clearly and unambiguously stated that "[e]quipment located at the mine face is not considered to be part of the coal preparation and processing plant." *Id.*

If EPA wanted to draft its rules so that such piles are only those located after crushing equipment or are only those that hold crushed/processed coal, it could have done so. Instead, EPA did the opposite and defined open storage piles as "any facility ... that is not enclosed that is used to store coal." 40 C.F.R. § 60.251(m). Further,

this definition explicitly recognizes equipment operating on top of the pile as subject to the rule, including "equipment used in loading, unloading and conveying operations of the facility." *Id.*

Here, CCMC's open storage pile is pushed up against a large retaining wall. ADD-101; ADD-102 (Aerial Photographs of CPPP and Haul Road). The feeder-breaker (i.e., the crushing equipment) protrudes directly out of this wall to the top of the coal pile. JA-1850; JA-1895 (Photographs of Crushing Equipment). Both CCMC and the Voigts agree that this feeder-breaker is an affected facility (it is crushing equipment) under NSPS Subpart Y. ADD-38 (Order Granting Summ. J. of Dismissal, p. 38). Additionally, CCMC's bulldozers operate directly on top of the pile to "convey" coal to the feeder-breaker by pushing it across the pile. JA-1616 (Dewayne Lounsbury Dep. 45:14-49:8). The bulldozers and the haul trucks that unload coal directly onto the pile are "equipment used in the loading, unloading, and conveying operations of the facility." 40 C.F.R. § 60.251(m) (emphasis added). Further, the bulldozer operator, who works primarily on top of the pile, is the coal processing facility operator. JA-1606 (Dewayne Lounsbury Dep. 10:11-11:8). The operator uses the remote-control equipment in the cab of the bulldozer to increase and decrease the speed of the crushing and conveying equipment while pushing coal into the feeder-breaker. JA-1621; JA-1622 (Dewayne Lounsbury Dep. 70:14-72:10). EPA clearly anticipated that "open storage piles" would be at coal processing

facilities, and CCMC's open storage pile appears to be a textbook example of what EPA had in mind. Even CCMC's CPPP operator agrees. At deposition, he referred to the "844 rubber tire dozer" and the "crusher facility" as one "coal plant." JA-1606 (Dewayne Lounsbury Dep. 11:1-8).

Further, CCMC designed the feeder-breaker (i.e., the crushing equipment) such that it is suspended high in the air toward the top of the retaining wall. ADD-103 (Aerial Photograph of CPPP). Therefore, the coal pile was engineered to be integral to the operation of the entire coal preparation and processing plant—it is physically not possible to load coal into the feeder-breaker without the pile. The district court and CCMC's CPPP operator both recognized that factually, CCMC's coal preparation and processing plant would have to be re-designed if the coal pile were omitted from the facility. ADD-26 (Order Granting Summ. J. of Dismissal, p. 26); JA-1615; JA-1616 (Dewayne Lounsbury Dep. 47:4-48:13).

The statement within the definition of "coal processing and conveying equipment" that "[e]quipment located at the mine face is not considered to be part of the coal preparation and processing plant" also indicates that CCMC's open storage pile is part of the coal preparation and processing plant. 40 C.F.R. § 60.251(f). This is because a haul road separates the mine face from the coal preparation and processing plant by approximately three-to-four miles. ADD-98 (Pit Layout and Facilities Map). The mine face is on one end of the road. *Id.* The coal

preparation and processing plant, including the open storage pile, is on the other. *Id.* The crushers, feeders, breakers, and conveyor belts (all of which CCMC agrees is part of its coal preparation and processing plant) are all located at the end of this haul road. ADD-98 through ADD-104 (Mine Plans, Diagrams, and Aerial Photographs). Those facilities are separated from the coal pile by the retaining wall, and the feeder actually protrudes directly through this wall out to the pile. *Id.* In other words, all the facilities share the same wall, and they are all co-located together far from CCMC's mine face.

At bottom, EPA has defined "[c]oal preparation and processing plant" to mean "any facility (excluding underground mining operations) which prepares coal by one or more of the following processes: breaking, crushing, screening, wet or dry cleaning, and thermal drying." 40 C.F.R. § 60.251(e). EPA's rules plainly recognize that open coal piles are part of such facilities—such piles are part of the facility "which prepares coal by … breaking [and] crushing…" *Id.* EPA has clearly indicated which types of facilities are *not* part of coal processing and conveying equipment: facilities located at the mine face. The pile is not at the mine face. It is co-located three-to-four miles away from the mine face with the remainder of the coal preparation and processing equipment. In this case, EPA's regulations, particularly read as a whole, are clear and unambiguous. *Long Mfg. Co., N.C., Inc. v. Occupational Safety & Health Review Comm'n*, 554 F.2d 903, 908 (8th Cir. 1977)

(it is proper to interpret regulations by reading them "as a whole"); *King v. St. Vincent's Hospital*, 502 U.S. 215, 221 (1991) (it is a "cardinal rule that a statute is to be read as a whole"). By holding that the "[t]he governing regulations do not provide a clear answer," the district court erred. ADD-33 (Order Granting Summ. J. of Dismissal, p. 33).

Case law interpreting EPA's New Source Performance Standards also supports the Voigts' position that NSPS Subpart Y, as applied to the circumstances of this case, is clear and unambiguous. In *Star Enter. v. U.S. E.P.A.*, 235 F.3d 139 (3d Cir. 2000), *as amended* (Feb. 20, 2001), the Third Circuit reviewed and overturned an EPA determination that NSPS Subpart J applied to gas turbines at a power plant adjacent to a petroleum refinery. Specifically, EPA had determined pursuant to 40 C.F.R. § 60.5 (discussed in detail, *infra*), that gas turbines at the power plant were "in" the adjacent petroleum refinery because the facilities were under common control, were adjacent to each other, and were integral to each other's operation. *Id.* at 148. The Third Circuit explained that "[d]espite the EPA's arguments to the contrary, in determining what facilities are "affected facilities" that can be regulated under Subpart J, and, specifically, in determining what facilities are "in petroleum refineries," the touchstone of such a determination is the physical location of the facilities in question." *Id.* at 151 (emphasis added). The court also explained that regardless of whether the power plant and its turbines are "integral"

to the refinery's operations, the power plant was not "necessary" to the plant's operations. *Id.* at 149-50. The court determined that the mere fact that a facility is "integral" is insufficient and reiterated that the most important part of the analysis is the facility's location. *Id.*

Applying the reasoning from *Star* to this case, the "physical location of the facilities in question" show that they are all built on one common "coal processing pad" that was specifically graded for this sole purpose. JA-795 (Excerpt from Section 3.2.8 of Permit Application Revision); JA-1750 (CCMC Rule 30(b)(6) Dep. 41:17-43:13); ADD-101 (Aerial Photograph of CPPP); ADD-104 (Haul Road Diagram from Permit Application Section 3.2.8). It also shows that the facilities are all co-located together (ADD-98 through ADD-102 (Mine Plans, Diagrams, and Aerial Photographs)), and that they are far from the rest of CCMC's facilities, i.e., the mine face. Looking at the facility from a geographic perspective, it is impossible to conclude that they are not co-located. Further, the coal pile is indeed both "necessary" and "integral" to the CPPP's overall operations. Without the coal pile, CCMC's CPPP operator and the district court both recognized that the facility would have to be re-designed to allow coal loading to the feeder-breaker because the feeder-breaker is situated at the top of the concrete retaining wall and not near ground level, and the facility was engineered to only function with the pile. ADD-26 (Order

Granting Summ. J. of Dismissal, p. 26; JA-1615; JA-1616 (Dewayne Lounsbury Dep. 47:4-48:13).

III. The district court also erred by deferring to the state of North Dakota's interpretation of NSPS Subpart Y, which is federal law.

Even if this Court were to accept the district court's conclusion that NSPS Subpart Y, as applied to this case, is ambiguous, the district court's resolution of this ambiguity is also in error. Specifically, the district court resolved what it perceived as ambiguity by ultimately deferring to North Dakota's original permitting decision. This is error for two related reasons. First, EPA has specifically created its own system for any owner or operator to request a determination from EPA as to whether or not an NSPS applies. In so doing, EPA unequivocally has retained authority to interpret its own rules. Second, under the structure of the Clean Air Act, EPA does not, and cannot, delegate authority to states to make decisions that affect the uniform applicability and consistency of a nationwide NSPS. Enabling states to offer their own competing interpretations of NSPS provisions would frustrate Congress's intent to promote nationwide uniformity of the law and EPA's implementing regulations.

a. EPA has expressly reserved the authority to interpret its NSPS provisions to itself by creating its own process for "any owner or operator" to request an applicability determination from EPA.

"When requested to do so by an owner or operator, the [EPA] Administrator will make a determination of whether action taken or intended to be taken by such owner or operator constitutes construction (including reconstruction) or

modification or the commencement thereof within the meaning of this part." 40 C.F.R. § 60.5(a). EPA commonly refers to these determinations as "applicability determinations." 40 C.F.R. Part 60 refers to EPA's NSPS. Thus, this provision allows any "owner or operator" to request that EPA "make a determination" as to whether or not any "action" of the owner or operator "constitutes construction" such that an NSPS would be triggered. 40 C.F.R. § 60.5. These applicability determinations are centrally indexed by EPA and placed online at: https://cfpub.epa.gov/adi/.

The Third, Fourth, Sixth, and Seventh Circuit Courts of Appeals have all explicitly held that that such EPA applicability determinations are final agency actions that may be reviewed directly by a court of appeals. The Third Circuit has explained:

> The Fourth and Seventh Circuit Courts of Appeals have held that EPA determinations made with respect to New Source Performance Standards are controlling unless plainly erroneous or inconsistent with the regulation at issue. *See Wisconsin Elec. Power Co.*, 893 F.2d at 907; *Potomac Elec. Power Co.*, 650 F.2d at 513. The Sixth Circuit, in contrast, has held that EPA determinations made with respect to New Source Performance Standards are controlling unless "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *National–Southwire Aluminum Co.*, 838 F.2d at 836.

Star Enter. v. U.S. E.P.A., 235 F.3d 139, 147 (3d Cir. 2000), *as amended* (Feb. 20, 2001). Like the Fourth and Seventh Circuits, the *Star Enterprise* court held that

applicability determinations made by EPA "must be upheld unless plainly erroneous." *Id.* at 147.

The *Star Enterprise* case is instructive not just on the merits of this case (as explained *supra*), but also on the issue of why deference to a state's interpretation of NSPS is improper. The applicability determination from EPA in *Star Enterprise* arose after "Star asked the EPA to issue a ruling stating that Subpart J does not apply to the Repowering Project's stationary gas turbines." *Id.* at 144. When Star learned that EPA's decision was not what Star had hoped for, Star "sought to withdraw its request for a determination of nonapplicability." *Id.* at 145. The State of Delaware (within which Star's facility was located) then "asked the EPA for a final determination because certain conditions to the issuance of a state construction permit were based on EPA's decision that Subpart J was applicable to the two stationary gas turbines." *Id.* In other words, Delaware explicitly recognized that EPA's authority was binding. At that point, Star sought review of EPA's decision before the Third Circuit. The Third Circuit clearly indicated in the excerpt above that states are bound by EPA's conclusions—they "are controlling." *Id.* at 147.

Likewise, *Wisconsin Elec. Power Co. v. Reilly*, 893 F.2d 901 (7th Cir. 2000) is also instructive. In that case, a power company submitted a proposed replacement program for equipment at a power plant to the Wisconsin Public Service Commission for approval. The Wisconsin Public Service Commission consulted

with the state's Department of Natural Resources "to determine if [the company] needed to obtain a PSD permit before commencing the repair and replacement program." *Id.* at 906. Notably, Wisconsin's Department of Natural Resources did not simply issue an applicability determination—the agency discussed the issue with EPA, which then resulted in an applicability determination *from EPA* pursuant to 40 C.F.R. § 60.5 that was binding on Wisconsin Power and the state. This posture in which that case arose underscores EPA's role in role in ensuring uniformity of its nationally applicable rules.

It is also notable that the Fourth, Sixth, and Seventh Circuit cases cited in *Star Enterprise* all recognize that significant deference to EPA's applicability determinations is proper. *Potomac Elec. Power Co. v. E.P.A.*, 650 F.2d 509 (4th Cir. 1981) (deferring to EPA's use of a "significant liability" test to determine timing of construction in applicability determination); *National-Southwire Aluminum Co. v. U.S. E.P.A.*, No. 86-3982, 1988 WL 5623 (6th Cir. Feb. 1, 1988) (noting that "special deference" to EPA's applicability determination, which interpreted the Clean Air Act and EPA's rules, was warranted); *Wisconsin Elec. Power Co. v.*, at 918 (noting that significant deference to EPA applicability determinations is warranted, but reversing determination in part). This is because in interpreting the applicability of an NSPS, EPA is interpreting its own rules.

EPA has plainly enacted a mechanism for owners and operators to seek a determination as to whether or not an NSPS is applicable. 40 C.F.R. § 60.5. The Third, Fourth, Sixth, and Seventh Circuits have all recognized the validity of this process, noting that such EPA applicability determinations are final agency actions subject to review directly in the courts of appeals, and that such EPA determinations are entitled to significant deference. Under these circumstances, EPA has clearly and unequivocally reserved to itself the right to determine whether or not an NSPS applies to a facility.

b. EPA explicitly does not, and cannot, delegate authority to a state to interpret an NSPS because such interpretations are at odds with national consistency.

It is also important that NSPS promulgated under the Clean Air Act are "Federal standards of performance…" 42 U.S.C. § 7411(b)(1)(B) (emphasis added). The Clean Air Act expressly identifies New Source Performance Standards as "nationally applicable regulations." 42 U.S.C. § 7607(b)(1) (emphasis added). Additionally, Section 111 of the Clean Air Act provides:

> In determining priorities for promulgating standards for categories of major stationary sources for the purpose of paragraph (1), the Administrator shall consider— …the mobility and competitive nature of each such category of sources and the consequent need for nationally applicable new source standards of performance."

42 U.S.C. § 7411(f)(2)(c). In other words, Congress was concerned about competition between the states, and specifically directed EPA to consider such

competition as one reason to promulgate "nationally applicable new source standards of performance." *Id.*

While EPA does delegate to states the authority to *implement and enforce* NSPS provisions pursuant to 42 U.S.C. § 7411(c), EPA specifically takes care to *not* delegate authority that affects national uniformity and consistency. Indeed, while North Dakota implements New Source Performance Standards, including NSPS Subpart Y, EPA's actual delegation of NSPS authority to the state of North Dakota prevents North Dakota (like all states) from interpreting EPA's performance standards in a way that affects national consistency and uniformity:

> Not all authorities of NSPS can be delegated to States under Section 111(c) of the Act, as amended. The EPA Administrator retains authority to implement those sections of the NSPS that require: (1) Approving equivalency determinations and alternative test methods, (2) decision making to ensure national consistency, and (3) EPA rulemaking to implement.

Clean Air Act Approval and Promulgation of Air Quality Implementation Plan Revision for North Dakota; Revisions to the Air Pollution Control Rules; Delegation of Authority for New Source Performance Standards, 71 Fed. Reg. 3764-01 (Jan 24, 2006) (emphasis added).

In summary, NSPS Subpart Y is a nationally applicable standard of performance. The district court erred by deferring to the state of North Dakota's interpretation of this purely federal law. EPA has expressly retained authority pursuant to 40 C.F.R. § 60.5 to interpret and determine whether or not an NSPS is

applicable to a facility, and EPA freely allows companies such as CCMC to use this process. Moreover, EPA's determinations are afforded significant deference by the courts. Additionally, the Clean Air Act only allows EPA to delegate authority to the states for "implementing" and "enforcing" the New Source Performance Standards. 42 U.S.C. § 7411(c). EPA expressly does not delegate authority to the states to *interpret* the law, especially if the state's interpretation would affect national consistency of the law. Moreover, the policy considerations underlying the Clean Air Act indicate that national uniformity of the Act's NSPS provisions is was a critical consideration of Congress – this is not merely stated in legislative history; rather, it is directly stated in the Clean Air Act. 42 U.S.C. § 7411(f)(2)(c).

The North Dakota Department of Health lacked authority to interpret the NSPS at issue in this case because the Department's purported interpretation would adversely affect national consistency of the law, and the district court therefore erred by deferring to such an interpretation. If such deference is allowed, a situation could easily arise in which certain states interpret a nationally applicable NSPS in a way that is less stringent (or more stringent) than other states,[2] which would frustrate

[2] Indeed, that is precisely what the district court's decision in this case impermissibly allows. The district court's position is that NSPS Subpart Y can either be interpreted so that it only applies to coal piles that store processed coal, or it can be interpreted to apply to piles more broadly. Although the NSPS is not ambiguous in this case, the district court's position nonetheless underscores the point that if one state adopts one interpretation and another adopts the other interpretation, then it would not be possible to maintain national consistency of this federal law.

Congress's clearly stated intent for national uniformity of New Source Performance Standards. This result—which is incongruous with Congress's intent—would be amplified if the federal courts to such differing state interpretations.

In this case, the district court essentially rewarded CCMC for not requesting an applicability determination from EPA by allowing CCMC to instead seek an implicit determination from the state of North Dakota and then deferring to the state. This alone is troubling given the language of the Clean Air Act and the Act's policy goals to specifically enact NSPS as uniform, nationally applicable standards. But it becomes all-the-more concerning given that North Dakota did not put this permit out for public notice and comment and instead simply approved the permit without any public review.

IV. Even assuming *arguendo* that deference is proper, North Dakota disallowed public comment and did not create a meaningful record to warrant any deference.

Whether federal or state standards are applied, the fact that North Dakota did not attempt to make a meaningful record to support its permitting decision is troubling. The North Dakota Supreme Court has explained that "the record must be sufficient to understand the reason for the Department's decision." *People to Save Sheyenne River, Inc. v. North Dakota Dep't of Health*, 2008 ND 34, ¶ 9, 744 N.W.2d 748. By not seeking public comment, NDDH essentially failed to create a meaningful record under state law.

Likewise, the standards under federal law are similar. "There are no findings and no analysis here to justify the choice made, no indication of the basis on which the [Health Department] exercised its expert discretion." *Burlington Truck Lines, Inc. v. U.S.*, 371 U.S. 156, 167–68 (1962). In *Burlington*, the Court continued on to say:

> [w]e are not prepared to and the Administrative Procedure Act will not permit us to accept such adjudicatory practice. Expert discretion is the lifeblood of the administrative process, but unless we make the requirements for administrative action strict and demanding, expertise, the strength of modern government, can become a monster which rules with no practical limits on its discretion ... The agency must make findings that support its decision, and those findings must be supported by substantial evidence.

Id. at 168. Thus, "a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis." *Ortega-Marroquin v. Holder*, 640 F.3d 814, 820 (8th Cir. 2011) (*quoting SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)).

Here, the North Dakota Department of Health did not give any indication in its written permit record as to how or why it arrived at its final permitting decision. As the cases above indicate, this is insufficient to uphold a federal agency's decision.

If it is insufficient to uphold a federal agency's decision, then it follows that it is certainly insufficient to warrant deference.

V. Conclusion

The law as applied to the circumstances of this case is clear and unambiguous. NSPS Subpart Y applies to "any" storage pile in "any facility" used to process coal that is "not at the mine face." 40 C.F.R. § 60.251(f),(m). CCMC's coal pile and activities upon its coal pile, including the haulage pattern after Station 207+38 are "in" the CPPP. 40 C.F.R. § 60.250(a). These facilities and activities are on a geographic area specifically graded for a "coal processing pad." JA-795 (Excerpt from Section 3.2.8 of Permit Application Revision); JA-1750 (CCMC Rule 30(b)(6) Dep. 41:17-43:13); JA-1884. The CPPP operator recognizes that both the bulldozer and the crushing equipment is one plant. JA-1606 (Dewayne Lounsbury Dep. 11:1-8). The bulldozer works directly on top of the coal pile. ADD-101 through ADD-103 (Aerial Photographs of CPPP). The CPPP operator also operates the crushing equipment directly from directly on top of the pile. JA-1616; JA-1617 (Dewayne Lounsbury Dep. 48:11-55:6); JA-1631; JA-1632 (Dewayne Lounsbury Dep. 111:18-112:17). The open storage pile, the concrete retaining wall, the crushing equipment immediately on the opposite side of the wall, the bulldozers, the haulage pattern after Station 207+38, and the conveyor belt are all co-located at the same location miles

away from CCMC's mine face. ADD-98 through ADD-102 (Mine Plans, Diagrams, and Aerial Photographs).

Both "as a matter of law" and because "a reasonable jury could [not] return a verdict otherwise," the district court's determination that these facilities are not subject to NSPS Subpart Y is in error. *Woods v. DaimlerChrysler Corp.*, 409 F.3d 984, 990 (8th Cir. 2005). For the foregoing reasons, the Voigts therefore respectfully request that this Court reverse the district court's order granting summary judgment to CCMC, along with the court's final judgment, grant the Voigts' motion for summary judgment, and remand this case for further proceedings.

Dated: September 28, 2018.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a). This brief contains 9,752 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in fourteen (14) point Times New Roman font.

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CIRCUIT RULE 28A(h) CERTIFICATION

The undersigned hereby certifies that I have filed electronically, pursuant to Circuit Rule 28A(h), a version of the brief in non-scanned PDF format. I hereby certify that the file has been scanned for viruses and that it is virus-free.

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The undersigned hereby certifies that on September 28, 2018, an electronic copy of the Brief of Plaintiffs-Appellants Casey Voigt and Julie Voigt was filed with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. The undersigned also certifies that the following participants in this case are registered CM/ECF users and that service of the Brief will be accomplished by the CM/ECF system:

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